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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE WASHINGTON, Defendant and Appellant.	B158325 (Super. Ct. No. BA212713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dale S. Fischer, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Juliet H. Swoboda, Deputy Attorney General, for Plaintiff and Respondent.

George Washington appeals from the judgment entered following his convictions by jury of three counts of attempted murder (Pen. Code, §§ 664, 187; counts one, two, and four) with personal use of a firearm (Pen. Code, § 12022.53, subd. (b)), personal and

intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)); five counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2); counts six through ten); and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count twelve), with admissions that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and three prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)).[1] He was sentenced to prison for 41 years plus 3 consecutive terms of 25 years to life.

In this case, appellant limits his arguments to issues arising in connection with only one of those counts. We hold there was sufficient evidence that, as alleged in count six, appellant committed assault with a firearm, including sufficient evidence of the requisite mens rea for that offense. We also hold the trial court did not err by giving the jury CALJIC No. 17.41.1. Finally, we hold the trial court did not err by denying appellant's motion for a new trial.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence as to count six established that prior to December 17, 2000, Barbara Hawkins periodically spent time in the area of Fifth and Crocker. Hawkins testified that at about 6:25 p.m. on December 17, 2000, she was with Robert McIntyre, Sr. in the area of Fifth and Crocker. McIntyre, Sr. was a blind person confined to a wheelchair, and he sold cigarettes. Hawkins was helping McIntyre, Sr. The area of

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[1] Counts three, five, and eleven were dismissed on the People's motion.

Fifth and Crocker was a "heavy" "pedestrian area," and there were a number of stores and hotels in the area. There were also streetlights in the area, which was relatively well lit. Hawkins was acquainted with appellant.

Hawkins was at the corner of Fifth and Crocker when she heard a "big commotion" across the street. There was a crowd across the street and someone was arguing. Sometime later, Hawkins observed appellant, also known as Chicken, on her side of the street. Appellant was upset and was "arguing with some guys that were there." A "group of guys were off to the side" of McIntyre, Sr., and appellant was "arguing with someone in that group." The group of guys were standing next to McIntyre, Sr. and Hawkins. Robert McIntyre, Jr. (hereafter, Junior), McIntyre, Sr.'s son, was among the group of guys. McIntyre, Sr. and appellant were friends on December 17, 2000. In the past, Hawkins might have seen appellant and Junior drinking beer or talking about sports.

Hawkins testified that appellant told Junior that Junior had not "backed [appellant] up in an earlier altercation or argument" or something that had occurred earlier that day. Junior replied that Junior "'didn't have nothing to do with that.'"[2] The prosecutor asked Hawkins how far she was from appellant when he was "arguing" with Junior; she replied the distance was about 19 feet. McIntyre, Sr. was then right next to Hawkins. The group of guys were about 16 or 17 feet from Hawkins. Hawkins and McIntyre, Sr. were "very close" to the group of guys.

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[2] Hawkins testified that after appellant yelled at Junior that Junior did not back him up, Junior said he did not have anything to do with it, and Junior might have said that he could not back up appellant because Junior did not have a gun.

When appellant was arguing, he had a bag in his hand. Hawkins observed appellant take a gun out of the bag. Hawkins testified that appellant "was waving it around, . . . just talking about 'you guys didn't back me up,' just waving it, . . . and it went off." When appellant was waving the gun, he sounded angry. Appellant was using profanity, but did not threaten anyone.

The prosecutor asked whether Hawkins had testified that "as the defendant had the gun in his hand, the gun fired, ..." Hawkins replied in the affirmative. The following occurred during Hawkins's direct examination: "Q How many times did you hear the defendant fire the gun? [¶] A Just once." The prosecutor asked Hawkins whether, before she observed appellant "shoot the gun," she had observed anyone attempt to assault him; she replied in the negative. No one in the group of guys threatened appellant.

At some point after the gun fired, Hawkins noticed that McIntyre, Sr. had been injured. McIntyre, Sr. was saying that he had been hit, and Hawkins observed blood under his leg. Once Hawkins realized McIntyre, Sr. had been hit, she did not look up to see where appellant was located. However, appellant left after the shooting. When the prosecutor asked whether Hawkins observed appellant again after he "fired the gun[,]" Hawkins replied in the affirmative. Hawkins testified that appellant returned to the area and told McIntyre, Sr., "'Man, I'm sorry, I didn't mean to shoot you.'" Hawkins guessed that appellant went back across the street. When paramedics later arrived, appellant was no longer on the same corner as Hawkins, and she did not see him again. Only McIntyre, Sr. had been struck by a bullet.

On December 20, 2000, Hawkins visited McIntyre, Sr. in the hospital and, at that time, a police detective talked with her about the incident. The prosecutor asked if the

detective showed Hawkins some photographs to see if she could recognize "the person you knew as Chicken that fired the gun[,]" and Hawkins replied in the affirmative. Hawkins identified appellant from the photographs. Hawkins did not want to testify against appellant and felt bad about doing so.

During cross-examination, Hawkins testified that she had been convicted of cocaine possession and twice had been convicted of forgery. She had spent a great deal of time in the area of Fifth and Crocker because she had a drug problem. There was a lot of automobile traffic in the area of Fifth and Crocker, as well as many pedestrians on the sidewalks on both sides of the street. The person who fired the gun was waving it in the air but not aiming it. Appellant was not aiming the gun at anyone. The following occurred during cross-examination: "Q Waving it around in the air, pointing upward? [¶] A I would say – you could say that, yes." Appellant asked Hawkins whether, when the gun "went off," appellant was pointing it in the direction of anyone; Hawkins replied in the negative.

Hawkins testified that on December 20, 2000, when police arrived at the hospital while she was visiting McIntyre, Sr., the police asked McIntyre, Sr. who had "had shot him," and McIntyre, Sr. replied "Chicken." McIntyre, Sr. then, referring to Hawkins, said, "'Ask her, she was right there.'"

Los Angeles Police Officer Gilbert Barrow testified that on December 19, 2000, a few days after the shooting, he went to the hospital where McIntyre, Sr. was and where Hawkins later arrived. Barrow testified he showed Hawkins a photographic mugshot folder containing appellant's photograph, and she identified appellant's photograph as depicting the "shooter." Hawkins told Barrow that Hawkins knew appellant. Hawkins

signed a statement indicating that appellant was "the person she saw with the gun that went off."[3]

Los Angeles Police Officer Garrett Cross testified that at 6:25 p.m. on December 17, 2000, he responded to the scene and observed a bullet entrance wound on McIntyre, Sr.'s right thigh and an exit wound on his left buttock. A bullet casing was found about five feet west of McIntyre, Sr.'s location, and a bullet fragment was recovered from a wall directly behind McIntyre, Sr.'s wheelchair. The location of the fragment indicated a bullet entered McIntyre, Sr.'s right thigh, exited the left buttock, and struck the wall.[4] The bullet casing was for a .40-caliber Smith and Wesson bullet, and the presence of the casing indicated that it had been fired from a semiautomatic gun. The bullet fragment had blood on it.[5]

The evidence, the sufficiency of which as to the following counts is undisputed, established that at about 7:30 p.m. on December 17, 2000, appellant, near Fifth and San Julian, committed attempted murder and assault with a firearm against Luis Chip

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[3] During cross-examination, Barrow testified he asked Hawkins, in essence, if she saw "who did this," and she replied in the affirmative. During redirect examination, the prosecutor asked whether, when Barrow spoke with Hawkins and obtained her statement, she told Barrow that she had observed the shooting of McIntyre, Sr. Barrow replied in the affirmative.

[4] Hawkins testified she observed blood under McIntyre's leg and ". . . I hate to say I assume, but it – apparently, the bullet must have ricocheted off of a wall or something and came from – up from behind, . . ." Hawkins did not testify that she observed any other wound.

[5] During cross-examination, Cross testified he used a flashlight to recover the bullet fragment or casing. Cross always exited his car with a flashlight and used it, and he needed it to illuminate the area. Fifth Street was a westbound street and Cross did not remember seeing traffic there when he arrived. During redirect examination, Cross testified the area of Fifth and Crocker was a "heavy pedestrian area," and there were hotels, stores, and shops on that street. The area was not lit too well, but the streetlamps in the area were operating when Cross arrived.

(counts one and seven), and against Isaac Mull (counts four and ten).[6] Appellant also committed attempted murder and assault with firearm against Francisco Chavez

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(counts two and eight).[7] Appellant further committed assault with a firearm against Jerry Chandler (count nine).[8]

Chandler had talked to appellant earlier that day. Chandler testified "there was a lot of racial things going on at that time[,]" and he had personally observed hostility between African-Americans and Hispanics in that area. Police recovered seven .40-caliber Smith and Wesson bullet casings from the scene. Appellant previously had been convicted of a felony. Appellant presented no defense evidence.

CONTENTIONS

Appellant contends: (1) The evidence was insufficient to support the conviction for assault with a firearm upon Robert McIntyre, (2) CALJIC No. 17.41.1, requiring jurors to report seemingly improper thoughts or intents during deliberations, was

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[6] The evidence established that at about 7:30 p.m. on December 17, 2000, Chip and Mull were walking together near Fifth and San Julian. Appellant, behind them, said, "'Latinos are going to die.'" Appellant cursed at several Latinos, including Chip and Mull. Appellant then reached into his sweatshirt, removed a gun, pointed it at Chip, and shot him in the stomach. (Counts one and seven.) Chip ran and appellant fired more shots. Appellant shot Mull in the left foot. (Counts four and ten.) Appellant fired at least five gunshots.

[7] The evidence established that at about 7:30 p.m. on December 17, 2000, Chavez was in the area of Fifth and San Julian. Appellant said, "' . . . hey, homes, hey homie . . . .'" Chavez ignored appellant, but appellant said, "' . . . hey homie . . . .'" Appellant shot Chavez in the left arm, and Chavez fled. Appellant then shot Chavez in the back, leaving him unable to walk. (Counts two and eight.)

erroneously given, and (3) The trial court abused its discretion in denying appellant's motion for new trial.

[8] The evidence established that at about 7:30 p.m. on December 17, 2000, Chandler, an African-American, was near Fifth and San Julian, heard the shots fired by appellant, fled, but realized that a bullet had struck him in his left wrist. (Count nine.)

DISCUSSION

1. *There Was Sufficient Evidence That Appellant Committed Assault With A Firearm As Alleged In Count Six.*

Appellant's contention amounts to no more than a request that we reweigh the evidence and substitute our judgment for that of the trier of fact. That is not the function of a reviewing court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Assault with a firearm is a general intent crime, not a specific intent crime. A person need not intend to commit violence against a specific victim or particular person to be guilty of an assault. The requisite mens rea is satisfied if a person willfully commits an *act* that by *its* nature will probably and directly result in injury to another. What is required is the defendant's intent to commit the act, not an intent to cause any consequences thereof, such as injury. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214-215; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1734-1737; *People v. Valdez* (1985) 175 Cal.App.3d 103, 107-108.)

There is no dispute as to the sufficiency of the evidence except to the extent appellant claims he lacked the requisite intent as to count six, which alleged that appellant committed assault with a firearm against McIntyre, Sr. However, appellant was arguing with a "group of guys" that included Junior. Appellant told Junior that Junior had not backed up appellant during an earlier argument or altercation. When appellant told this to Junior, McIntyre, Sr. was very close to the group of guys. Junior replied that he "'didn't have nothing to do with that[,]'" and might have said that he could not back up appellant because Junior did not have a gun.

Appellant removed a gun from a bag he was holding. There was no evidence that appellant then mishandled or dropped the gun, but it discharged. Hawkins testified the

gun was in appellant's hand when the gun fired, and that she heard appellant fire the gun once.

The trial court was free to reject all or part of the testimony of Hawkins, who felt badly about testifying against appellant and who spent time with a drug problem in the area of Fifth and Crocker. In particular, the trial court was not obligated to believe that appellant had been waving the gun upward in the air when the gun discharged.[9] Cross's testimony provided substantial evidence that the gun was not pointed directly upward when it discharged, but was pointed at the right thigh of McIntyre, Sr., who was seated. McIntyre, Sr. was very near the group of guys, including Junior, and appellant was angry with Junior; appellant's anger provided a motive for him to shoot Junior.

When the gun discharged, appellant did not express surprise that the gun had discharged or state that he had not intended to fire it. Instead, appellant left, evidencing consciousness of guilt. We note that, according to Hawkins, when appellant returned, appellant told McIntyre, Sr. that appellant he did not intend to shoot McIntyre, Sr.; appellant did not then state that he did not intend to shoot anyone.

There is no dispute that, about an hour later and a short distance from Fifth and Crocker, appellant intentionally fired a gun and shot Chip, Mull, Chavez, and Chandler. The bullet casings ejected during those shootings were of the same caliber and brand as the bullet casings involved in count six, and provided evidence that appellant used the same gun during all the shootings in this case. These facts provide evidence that

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[9] Nor was the trial court obligated to believe Hawkins's speculative musings about how McIntyre, Sr. was hit. We note that, even if the gun was pointed upward when it discharged, that fact would not necessarily negate an assault, since appellant was in downtown Los Angeles in an area where there were hotels, and a person in one of them could have been struck by an upward traveling bullet.

appellant, about an hour before at Fifth and Crocker, fired a gun and did so intentionally, not accidentally.

In sum, there was substantial evidence that appellant, angry with Junior for allegedly failing to support him during a previous altercation, intentionally fired the gun to shoot him but instead hit McIntyre, Sr., who was very close to Junior.[10] There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed assault with a firearm against McIntyre, Sr., as alleged in count six, including sufficient evidence of the requisite mens rea for that offense. (*People v. Colantuono*, *supra*, 7 Cal.4th at pp. 214-215; *People v. Ochoa*, *supra,* 6 Cal.4th at p. 1206; *People v. Lee*, *supra*, 28 Cal.App.4th at pp. 1734-1737; *People v. Valdez*, *supra*, 175 Cal.App.3d at pp. 107-108.) Neither the cases cited by appellant, nor his argument, compels a contrary conclusion.

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[10] There was also evidence that all of the shootings in this case were intentional and race-related.

2. *The Court Did Not Reversibly Err By Giving CALJIC No. 17.41.1.*

The court instructed on jury misconduct using CALJIC No. 17.41.1 (1998 new).[11] Appellant claims that the giving of the instruction violated his constitutional rights and constituted reversible error. We disagree. (*People v. Engelman* (2002) 28 Cal.4th 436, 439-449.)

3. *The Trial Court Did Not Err By Denying Appellant's Motion For A New Trial.*

a. *Pertinent Facts.*

Appellant moved for a new trial on the ground of newly discovered evidence. At the hearing on the motion, Hawkins testified that on December 17, 2000, she was with McIntyre Sr. at Fifth and Crocker when he was shot. She did not then see appellant. When the shooting occurred, she saw a person with a gun, but the person was not appellant. Appellant was not the person who apologized to McIntyre Sr., and she did not see appellant argue with Junior that day. When Hawkins was later shown photographs, she identified appellant on the basis of what she had heard. She had testified on more than one occasion that appellant was the shooter, but she had done so because she had heard people say appellant was the shooter.

During cross-examination, Hawkins conceded she knew appellant's appearance before the shooting incident. A few days after the shooting, she signed a statement reflecting that she saw appellant shoot McIntyre, Sr. She told a detective that she did not want to testify, and Hawkins had to be subpoenaed. At the preliminary hearing, she

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[11] CALJIC No. 17.41.1 (1998 new) reads: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or

testified she was six feet from the shooter when he fired the gun. She told the prosecutor before trial that she saw appellant shoot the gun and hit McIntyre, Sr. At trial, she testified that she was reluctant to testify, and also testified that she saw appellant shoot the gun and hit McIntyre, Sr.

Ruling on the motion, the court stated, "I, of course, presided over the trial and viewed Ms. Hawkins's testimony. At that time, I found her very credible. It was clear she was reluctant both at trial and at the hospital. The testimony was not the testimony of someone who was either lying or mistaken, in my view, and I found her testimony here today not to be worthy of credibility, and therefore the new trial motion is denied."

b. *Analysis.*

The determination of a motion for a new trial rests completely within the trial court's discretion, and its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Staten* (2000) 24 Cal.4th 434, 466.) This applies to motions for a new trial based on newly discovered evidence. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252.)

In ruling on a motion for new trial based on newly discovered evidence, the trial court considers a variety of factors, including whether the evidence was such as to render a different result probable on a retrial of the cause. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

As this division observed years ago in *People v. Langlois* (1963) 220 Cal.App.2d 831, 834-835, "The fact that an important prosecution witness has recanted does not necessarily compel the granting of the motion. In such a case the trial judge is required to

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any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

weigh the evidence offered in support of the motion, and he may reject it if he deems it unworthy of belief. [Citations.] [¶] The offer of a witness, after the trial, to retract his sworn testimony is always looked upon with suspicion. [Citations.] In 158 American Law Review Reports 1062 the editors state: 'A study of the cases in the original annotations and those decided subsequently indicates that the courts, with their experience with witnesses, generally pay but little regard to the statements of a recanting witness, and only in extraordinary and unusual cases will a new trial be allowed because of the recanting statements.'" (*People v. Langlois*, *supra*, 220 Cal.App.2d at pp. 834-835.) In the present case, based on the pertinent facts, we conclude the trial court did not abuse its discretion by denying appellant's motion for new trial. (Cf. *People v. Staten*, *supra*, 24 Cal.4th at p. 466; *People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1251-1252; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1004; *People v. Langlois*, *supra*, 220 Cal.App.2d at pp. 834-835.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.